

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
May 22, 2014

v

SCOTT JAMES COVERDILL, a/k/a SCOTT
JAMES BALLARD,

Defendant-Appellant.

No. 313679
Oakland Circuit Court
LC No. 2003-190195-FH

Before: BORRELLO, P.J., and WHITBECK and K. F. KELLY, JJ.

PER CURIAM.

Defendant appeals by leave granted¹ the order denying defendant's petition to discontinue sex offender registration. Finding no errors requiring reversal, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

On April 7, 2003, defendant, an 18 year old high school senior, attended a party in Holly, Michigan. Also at the party was the 14-year-old complainant, who was a freshman at Holly High School. The two eventually engaged in sexual intercourse inside defendant's vehicle. The complainant later told a friend what happened and the police investigated the matter. Ultimately, defendant pleaded guilty to third-degree criminal sexual conduct (CSC III) pursuant to MCL 750.520d(1)(a) (sexual penetration with a person at least 13 years of age and under 16 years of age). As a result of defendant's guilty plea, he was adjudicated under the Holmes Youthful Trainee Act (HYTA), MCL 762.11 *et seq.*, and was sentenced to 1,095 days in the Michigan Department of Corrections. Defendant was also required to register as a sex offender under the Sex Offender Registry Act (SORA), MCL 28.721 *et seq.* After serving three years in prison, defendant earned HYTA dismissal and was released; however, he was still required to register as a sex offender for life.

¹ *People v Coverdill*, unpublished order of the Court of Appeals, entered September 20, 2013 (Docket No. 313697).

In 2011, defendant filed a petition requesting removal from the sex offender's registry, arguing that the conduct at issue was consensual and that continued registration was cruel and unusual punishment. After a three-day evidentiary hearing, the trial court rejected both arguments and ordered that SORA registration continue. Defendant now appeals by leave granted.

II. ANALYSIS

1. PROOF OF CONSENT

Defendant argues that the trial court erred in determining that he failed to prove that the sexual intercourse was consensual by a preponderance of the evidence. We disagree.

The lower court's findings of fact with regard to a defendant's petition for removal from the sex offender registry are reviewed for clear error. *People v Hesch*, 278 Mich App 188, 192; 749 NW2d 267 (2008). "A decision is clearly erroneous if this Court is left with a definite and firm conviction that a mistake has been made." *Id.* (internal quotation marks omitted). "This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses." *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005).

Under MCL 750.520d(1)(a), a person is guilty of CSC III if the person engages in sexual penetration with another person that is at least 13 years of age and under 16 years of age. An individual classified as a tier III offender² who meets the requirements of MCL 28.728c(14) may petition the court for an order allowing him to discontinue registration under this act. MCL 28.728c(3). Pursuant to MCL 28.728c(14), the court shall grant a petition under MCL 28.728c(3) "if the court determines that the conviction for the listed offense was the result of a consensual sexual act between the petitioner and the victim," and all of the following apply:

- (i) The victim was 13 years of age or older but less than 16 years of age at the time of the offense.
- (ii) The petitioner is not more than 4 years older than the victim.

At issue in this case is whether there was "a consensual sexual act." Consent "impliedly comprehends that a willing, noncoerced act of sexual intimacy or intercourse between persons of sufficient age who are neither 'mentally defective', . . . 'mentally incapacitated', . . . nor 'physically helpless,' . . . is not criminal sexual conduct." *People v Bayer*, 279 Mich App 49, 67; 756 NW2d 242 (2008), judgment vacated in part on other grounds 482 Mich 1000 (2008), quoting *People v Khan*, 80 Mich App 605, 619 n 5; 264 NW2d 360 (1978). Physically helpless in terms of criminal sexual conduct "means that a person is unconscious, asleep, or for any other reason is physically unable to communicate unwillingness to an act." MCL 750.520a(m).

² Third-degree CSC, MCL 750.520d, is a "Tier III offense." MCL 28.722(w)(iv).

As a result of defendant's guilty plea under MCL 750.520d(1)(a), an offense not specifically requiring force or coercion, the matter of consent was not determined. The parties agreed that the burden was on defendant to prove by a preponderance of the evidence that the sexual act was consensual. Preponderance of the evidence "means such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth." *People v Cross*, 281 Mich App 737, 740; 760 NW2d 314 (2008).

Defendant testified that the complainant was not so intoxicated that she failed to consent. He testified that the complainant put her hand on his upper thigh and asked him if he "wanted to," she never told him "no" or "stop," and even suggested sexual positions. However, there was also evidence that the complainant was physically unable to communicate unwillingness to engage in sexual intercourse. The complainant testified that she drank mixed vodka drinks at first, and then started drinking vodka straight from the bottle. She testified that she fell down in the living room and vomited because she was "incredibly intoxicated." The complainant testified that when the party ended, she was too drunk to walk and assumed she was carried out to defendant's truck. Her recollection of what happened inside defendant's truck was "fairly limited." The complainant testified that she was going in and out of consciousness and remembered defendant on top of her with his shirt unbuttoned. The complainant was adamant that she did not consent, and did not have the ability to tell defendant to stop. She stated, "I believe that I was passed out and too inebriated to consent [to sexual intercourse]." Additionally, the complainant had a blood alcohol level of .033 approximately three to four hours after she stopped consuming alcohol.

The trial court concluded that defendant had not proved by a preponderance of the evidence that the sexual act was consensual:

From the hearing, evidence is persuasive and somewhat relevant that petitioner had a reputation for promiscuity and actually was promiscuous. Evidence is persuasive and somewhat relevant that the [complainant]. . . . exhibited signs, if not of consent itself, precursors to it, i.e., sexual gestures by the only female at the party that is – been referenced to in this hearing.

* * *

There is a lot with [the complainant's] testimony that leaves this Court skeptical of her, and that skepticism is itself evaluated in light of her age, maturity, and mental health in 2003. The Court is no more persuaded than unpersuaded that its skepticism today is a consequence of her dishonesty than of these other factors. If [the complainant] had the burden of proof to prove she was forced or coerced, or if she had to disprove that she consented, she would fail.

Petitioner, however, has the burden of proof. This Court does not know by a preponderance of the evidence if she consented. For all this Court knows, she did say all the things petitioner attributes to her. For all it knows, she didn't. For all the Court knows, despite her forlornness in 2003 caused by her parents or otherwise, she was possessed of mental liberty. For all it knows, she was not. For all the Court knows, despite her tender years, despite and maybe . . . her parents'

cavalier implicit acquiescence with her being the only female at a party of teenage males, and she at the budding age of 14 no less, for all the Court knows, despite all this, she was mature enough to consent. For all it knows, she wasn't. It's a wash, and therefore, petitioner having the burden of proof, has not met it for this Court to find consent.

Given that the burden of proof was on defendant, the court's findings regarding credibility and conclusion that defendant failed to prove consent by a preponderance of the evidence was not clearly erroneous. *Hesch*, 278 Mich App at 192.

2. CRUEL AND UNUSUAL PUNISHMENT

Defendant next contends that the registration requirement under SORA, as applied to him, constitutes a cruel and unusual punishment. We disagree.

This Court reviews constitutional issues de novo. *People v Fonville*, 291 Mich App 363, 376; 804 NW2d 878 (2011). "Statutes are presumed to be constitutional, and courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *People v Lueth*, 253 Mich App 670, 675; 660 NW2d 322 (2002). The party challenging a statute has the burden of proving its invalidity. *People v Thomas*, 201 Mich App 111, 117; 505 NW2d 873 (1993).

The United States Constitution prohibits cruel *and* unusual punishment. US Const, Am VIII. The Michigan Constitution prohibits cruel *or* unusual punishment, Const 1963, art 1, § 16, Sand if a punishment "passes muster under the state constitution, then it necessarily passes muster under the federal constitution." *People v Benton*, 294 Mich App 191, 204; 817 NW2d 599 (2011), quoting *People v Nunez*, 242 Mich App 610, 618–619 n 2; 619 NW2d 550 (2000).

Defendant relies on this Court's decision in *People v DiPiazza*, 286 Mich App 137; 778 NW2d 264 (2009). In *DiPiazza*, the defendant was 18 years old when he had a consensual sexual relationship with another teenager nearly 15 years old. *Id.* at 139-140. The parents of the 15 year old condoned the relationship; however, the school reported it. *Id.* at 154. The defendant was adjudicated under the HYTA, MCL 762.11, for attempted CSC III, MCL 750.520d(1)(a), and successfully completed the terms of his probation. *Id.* at 140. The defendant later married the other teenager and was unable to find employment due to the sex offender registration. *Id.* at 154. The defendant petitioned the circuit court asking that his name be removed from the sex offender's registry because the requirement, as applied to him, constituted cruel and unusual punishment. *Id.* at 140. This Court, "after considering the gravity of the offense, the harshness of the penalty, a comparison of the penalty to penalties imposed for the same offense in other states, and the goal of rehabilitation, conclude[d] that requiring defendant to register as a sex offender for 10 years is cruel or unusual punishment." *Id.* at 156.

The facts in the instant case are distinguishable from *DiPiazza*. The trial court found that defendant failed to prove by a preponderance of the evidence that the sexual act was consensual. Moreover, the Michigan Legislature, on July 1, 2011, amended SORA to provide a defendant assigned to HYTA before October 1, 2004, relief in a situation in which the sexual act was consensual. MCL 28.728c(14). As a result of the 2011 amendment, SORA allows an individual

who was assigned to HYTA before October 1, 2004, to petition the court for removal from the sex offender registry, and if the court determines that the conviction for the listed offense, i.e., MCL 750.520d(1)(a), “was the result of a consensual sexual act between the petitioner and the victim,” that it shall grant the petition. MCL 28.728c(14). This amendment specifically addresses transgressions involving consensual sex during a “Romeo and Juliet” relationship, as analyzed by the *DiPiazza* Court before the enactment of the amendment.

Because the 2011 SORA amendment appears to have been enacted to prevent individuals assigned to youthful trainee status before October 1, 2004, from remaining on the public sex offender registry if engaged in a consensual relationship, and defendant does not fall within the scope of this provision, the registration requirements of SORA do not constitute a punishment as applied to defendant.

Affirmed.

/s/ William C. Whitbeck

/s/ Kirsten Frank Kelly